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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



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DATE: DEC 08 2011

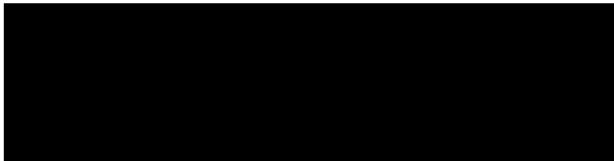
Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:




INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Eric Haldan
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, [REDACTED] states that it produces and markets vegetable oils and fats in the Americas. The petitioner claims to have a qualifying relationship with [REDACTED], located in Bogota, Colombia, and [REDACTED] located in Mexico City, Mexico. The petitioner seeks to employ the beneficiary as the Director, U.S. Operations of its office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be primarily performing the duties of a manager or executive with the U.S. company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner states that the director's erroneous decision "spends more time in the analysis of Petitioner's current employees' job duties and job titles than on Beneficiary's actual job duties and responsibilities in the [U.S.] and abroad." Counsel submits a brief and additional evidence on appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the U.S. company in a primarily managerial or executive capacity.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 29, 2009. The petitioner indicated on the Form I-129 that it produces and markets vegetable oils and fats in the Americas with two current employees and a gross annual income of \$2,943,592. In support of the petition, the petitioner submitted a letter describing the duties of the beneficiary as follows:

The U.S. position of Director, U.S. Operations is a managerial-level position which will be responsible for spearheading the identification and analysis of potential mergers and acquisitions to support the U.S. strategic initiatives of the parent company, [REDACTED]

As Director, U.S. Operations, [the beneficiary] will be responsible for[:]

- [I]dentification and evaluation of merger and acquisition opportunities relating to joint venture operations in the [U.S.];
- [I]dentification, evaluation/analysis and planning of acquisition opportunities to support [REDACTED] strategic objectives using his in-depth knowledge of current and long term strategic business plans;
- [E]valuate potential merger and acquisition of business opportunities;
- [W]ill be involved in the structuring/negotiation of transactions, if such opportunities are located, partnering with a variety of cross-functional areas in the company such as legal, corporate development and accounting;
- [S]pearhead transitional due diligence to coordinate the process with a variety of external and internal contacts such as investment banks, consulting firms, financial sponsors and potential acquisitions, among others.
- [P]repare a variety of internal and external documentation such as graphs, reports, charts and presentations relating to the merger and acquisition activities for [REDACTED] management;
- [E]ngage in maintaining post-acquisition integration planning as a result of successful merger and acquisition, including interacting with outside counsel as well as internal employees in tax, accounting and other cross-segment functions;

(Bullets added.)

Finally, [the beneficiary] will be the highest ranking Team employee in the U.S. and have supervisory responsibilities over all activities at the U.S. office including its two professional employees. Given the significant role and responsibilities as Director, U.S. Operations, [the beneficiary] will exercise significant discretion in his day-to-day responsibilities and report directly to the Executive Management of [REDACTED]

The petitioner did not submit any additional information describing the duties of the beneficiary on a day-to-day basis.

The director issued a request for additional evidence ("RFE") on July 7, 2009, instructing the petitioner to submit, *inter alia*, the following: (1) indicate the total number of employees at U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees he supervises by name and job title, including a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; and (3) a more detailed description of the beneficiary's duties in the United States, specifically indicating the percentage of time the beneficiary spends on each of the listed duties.

Counsel for the petitioner submitted a response to the RFE where she addressed the beneficiary's duties for the U.S. company. The response reiterated the exact duties listed above (submitted with the initial petition) and added the following sentence: "In the short term, it is anticipated that the beneficiary will devote 80% of his time to the expansion efforts as elaborated above and 20% of his time to overseeing the current U.S. operations including oversight of the office and existing employees."

In response to the RFE, the petitioner submitted an organizational chart for the U.S. company, a list of employees for the U.S. company, and the U.S. company's quarterly wage reports for 2009. The quarterly wage reports indicated that the U.S. company employed the same two individuals throughout and did not hire additional subordinate staff for the beneficiary.

The petitioner submitted an organizational chart for the U.S. company listing the beneficiary as Director, U.S. Operations, one named subordinate titled Business Development Manager, one vacant subordinate position titled Business Development Manager West Coast, one vacant subordinate position titled Business Development Manager East Coast, one vacant subordinate position titled Logistics and Operations Manager, and one named subordinate titled Logistics Coordinator. The petitioner also submitted a job description for the two named subordinate positions; however, the person named for the Logistics Coordinator position on the organizational chart is listed as a Customer Service Representative on another document and the job description provided is for a Customer Service Representative with a job category of "Customer Service: Transportation/Logistics."

The director denied the petition on July 31, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position.

In support of the appeal, counsel submits a brief in which she asserts that the beneficiary will be employed primarily in a qualifying managerial capacity. Counsel further asserts that "[t]he Service . . . has failed to consider or analyze the duties of the beneficiary as a functional manager who will be engaged in merger and acquisition opportunities"

On appeal, counsel describes the beneficiary's job duties as follows:

As the Director, U.S. Operations, Beneficiary's primary job duties will be to oversee the growth and expansion of Petitioner's business opportunities in the United States which primarily involve the review of merger and acquisition opportunities in the United States, which includes acquisition of business related to Petitioner's global business of the manufacture, distribution, and sale of food products. As stated in the documents, Petitioner, through its parent company, has committed an initial budget of \$50 million for such acquisition projects. As the Director, U.S. Operations, Beneficiary will be in charge of the identification of potential merger and acquisition candidates, exploration of joint ventures and establishment of additional subsidiary companies. Beneficiary will be the main point of contact in these discussions, and will be engaged in high-level negotiations and discussions with potential business partners, as well as overseeing all financial, legal and due diligence aspects of said business expansion. In this position, Beneficiary will have the authority to commit Petitioner to such long-term strategic acquisitions and will be the highest ranking employee of Petitioner in the United States. Beneficiary will report directly to the Board of Directors of Petitioner and/or Petitioner's parent company in Colombia.

* * *

Beneficiary, as the highest ranking employee of Petitioner and as an Officer and Director of Petitioner . . . while not directly involved in lower level hiring will, from a strategic and corporate planning perspective, be involved in approving the hiring of other executive and managerial level employees. As set forth in the organization chart, beneficiary will oversee and approve the hiring of other Business Development Manager who will then be charged with staffing their respective departments. This is a normal managerial and executive function within any successful organization and the beneficiary will both directly hire and fire employees and function at a senior-level within the organization.

* * *

Beneficiary is clearly a functional manager in that:

- Beneficiary will be the highest-ranking officer of Petitioner's business, responsible for overseeing a budget of \$50 million for merger and acquisition activities, as well as approving strategic business development and marketing plans.

- Beneficiary will have a wide latitude and discretionary authority, and report directly to the Board of Directors of Petitioner and to Petitioner's parent company in Colombia.

The Beneficiary is also an executive as demonstrated by the following:

1. The Beneficiary directs the management of the organization or a major component or function of the organization.
2. Beneficiary establishes the goals and policies of the organization, component or function.
3. Beneficiary will exercise wide latitude and discretionary decision making.
4. Beneficiary will receive only general supervision or direction from higher level executives, the board of directors or stockholders of the organization.

Counsel also submits photocopies of the same evidence submitted with the initial petition and another set of photocopies of the same evidence submitted in response to the RFE. Neither counsel nor the petitioner has submitted any new evidence on appeal.

Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its director. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26,

1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the petitioner and counsel provided the same statements of the beneficiary's job duties in the initial petition and in response to the RFE. The percentage breakdown provided by counsel in response to the RFE did not provide any detail on the beneficiary's daily activities; it merely stated, "the beneficiary will devote 80% of his time to the expansion efforts . . . and 20% of his time to overseeing the current U.S. operations including oversight of the office and existing employees." Counsel then provided additional statements on appeal describing the beneficiary's job duties in very broad terms, noting that he will "oversee the growth and expansion of Petitioner's business opportunities in the United States," "be involved in approving the hiring of other executive and managerial level employees," "have a wide latitude and discretionary authority and report directly to the Board of Directors of Petitioner and petitioner's parent company in Colombia," and "be in charge of all U.S. operations for Petitioner's business." Some of the duties listed by counsel on appeal merely paraphrase the statutory definition of managerial capacity and executive capacity. See section 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). Therefore, although the beneficiary is not required to supervise personnel, if the petitioner claims that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a

bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The organizational chart submitted by the petitioner shows two named subordinates and three pending hires. One of the named subordinates is the Business Development Manager; the job description for that position does not specifically require a college level degree, it simply states, "education level required: food science or related field" and a minimum of 10 years of related business experience (although counsel specifies on appeal that a bachelor's degree is required). The other named subordinate is the Logistics Coordinator who is titled the Customer Service Representative on other submitted documents; the job description for the Customer Service Representative states, "education level required: high school diploma, preferably with a BA/BS in Business, Logistics or a related field" and a minimum of three years of related business experience. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel as the petitioner states that oversight of employees accounts for no more than 20 percent of his time. *See* section 101(a)(44)(A)(ii) of the Act. Additionally, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development and awaiting the approval of this petition in order to expand its business, the petitioner is not relieved from meeting the statutory requirements.

On appeal, counsel claims that the beneficiary manages the essential function of expanding U.S. operations. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties; *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). Here, the petitioner claims that the beneficiary will manage the essential function of expanding business in the United States; however, the petitioner failed to provide a detailed breakdown of the beneficiary's job duties to satisfy such a claim. The petitioner failed to articulate the beneficiary's duties as a function manager and failed to provide a breakdown indicating the amount of time the beneficiary spends on duties that would clearly demonstrate he manages the essential function of expanding business in the United States.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than require him to focus on day-to-day operations. The petitioner has failed to articulate how the beneficiary's subordinates will relieve him from performing non-qualifying administrative and operational duties.

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner indicates that the beneficiary has two subordinates, a business development manager and a customer service representative. Although the petitioner submitted job details for each position, it is unclear how these subordinates will relieve the beneficiary from performing other non-qualifying administrative and operational duties associated with the day-to-day operations of the U.S. company. The petitioner indicates that it will hire additional employees in the future; however, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971).

The beneficiary in this matter has not been shown to be employed in a primarily managerial or executive capacity or as a function manager. The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Additional Considerations

The AAO notes that the beneficiary had an H-1B classification petition filed in his behalf by the petitioner on September 2, 2009 that was approved on September 8, 2009. On July 29, 2010, counsel for the petitioner submitted a request to withdraw said petition because the beneficiary "will no longer be employed by [the petitioner] as of July 30, 2010." The AAO notes that, based on this additional information, it cannot be concluded that the petitioner currently intends to employ the beneficiary in the proffered position.

IV. Conclusion

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.